Supreme Court, U. S.
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No. 80-1020

In the Supreme Court of the United States

October Term, 1980

RALPH W. ADAMS, President of Troy State University; EDWARD F. BARNETT, Vice-President of Academic Affairs, Troy State University; JOHN M. LONG, Dean of the College of Arts and Sciences, Troy State University; and DUANE C. TWAY, Chairman of Department of History and Social Studies, Troy State University,
Petitioners,

vs.

NICHOLAS E. D'ANDREA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

IS SPEECH CONSTITUTIONALLY PROTECTED SO LONG AS THE SPEAKER IS TRUTHFUL IN IDENTIFYING THE SUBSTANCE OF HIS STATEMENT AS GROUNDED ON HEARSAY, THUS PRECLUDING INQUIRY INTO WHETHER THE UNDERLYING INFORMATION CONVEYED BY THE STATEMENT WAS COMMUNICATED WITH RECKLESS DISREGARD FOR TRUTH OR FALSITY?

II.

DOES COMMUNICATION WHICH IS CORRECTLY ACKNOWLEDGED AT THE TIME TO BE BASED ON HEARSAY AND WHICH TAKES THE FORM OF REPETITION OF AN UNVERIFIED, YET EASILY VERIFIABLE, INHERENTLY IMPROBABLE AND UNTRUE RUMOR FALL OUTSIDE THE CLASSIFICATION OF STATEMENTS MADE WITH RECKLESS DISREGARD FOR THEIR TRUTH OR FALSITY SO AS TO QUALIFY SUCH COMMUNICATION FOR FIRST AMENDMENT PROTECTION?

LIST OF ALL PARTIES

The parties to this proceeding are as follows:

Nicholas E. D'Andrea

Ralph W. Adams

Edward F. Barnett

John M. Long

Duane C. Tway

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No. .....

In the Supreme Court of the United States

October Term, 1980

RALPH W. ADAMS, President of Troy State University; EDWARD F. BARNETT, Vice-President of Academic Affairs, Troy State University; JOHN M. LONG, Dean of the College of Arts and Sciences, Troy State University; and DUANE C. TWAY, Chairman of Department of History and Social Studies, Troy State University,

Petitioners,

vs.

NICHOLAS E. D'ANDREA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Ralph W. Adams, Edward F. Barnett, John M. Long and Duane C. Tway, defendants-appellees below, pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its decision entered September 26, 1980, reversing an order granting the defendants' motion for judgment n.o.v. in an action by a university professor charging violations of his civil rights by state university officials.

OPINIONS BELOW

The opinion of the United States District Court is not officially reported. (Apx. A). The opinion of the Court of Appeals for the Fifth Circuit is reported as *D'Andrea v. Adams,* at 626 F. 2d 469 (5th Cir. 1980). (Apx. B).

JURISDICTION

Jurisdiction is based on 28 U.S.C. §1254(1). The Court of Appeals entered its decision on September 26, 1980 (Apx. B), and denied rehearing on October 27, 1980. (Apx. C).

STATEMENT OF THE CASE

Plaintiff, a college professor, brought an action against certain school officials under 42 U.S.C. §1983 and charged that actions had been taken adverse to him as a result of the exercise by him of First Amendment rights to free expression. Jurisdiction was grounded upon 28 U.S.C. §§1331, 1343. The defendants unsuccessfully moved for summary judgment and for a directed verdict. The jury returned a verdict for the plaintiff and the District Court entered judgment notwithstanding the verdict.

The Fifth Circuit reversed the District Court and reinstated the verdict based upon its determination that plaintiff's speech was constitutionally protected as plaintiff, in the Fifth Circuit's view, had made a true statement when he stated that he had heard a rumor and then truthfully recounted the rumor to a staff member of the Alabama legislature which was then conducting budget hearings as to the University. The Fifth Circuit thus concluded that it need not apply the limitation on First Amendment protection with reference to false statements or statements

made in disregard for their truth or falsity. See, *e.g.*, *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811 (1968).

The substance of the rumor, which plaintiff never contended to be true, was that Troy State University had caused some million dollars in currency to be flown to New York for an investment in the Alaskan pipeline and then caused the currency to be returned some few weeks thereafter with a $400,000.00 profit. (Tr. 196, 273). According to the plaintiff, the basis of the rumor was secondhand hearsay related to him by certain students and, at all material times, plaintiff knew the identity of the individual who was alleged to be the source of the underlying information. (Tr. 246). However, plaintiff testified that he made absolutely no effort to verify the rumor before he relayed it to the legislative staff member. (Tr. 246).

REASON FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit has broadened the scope of First Amendment protection so as to include false statements made in reckless disregard of the truth which have the sole redemption of having been truthfully characterized as hearsay. This decision on a substantial federal question conflicts with *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968) wherein this court held that First Amendment protection was unavailable for "statements shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity".

ARGUMENT

The Fifth Circuit has lent First Amendment support to expression that is nothing more than the passing on of an outlandish and unverified rumor by a state college professor to an investigative staff member of the Alabama legislature. The rumor was so far-fetched that the Fifth Circuit, of necessity, conceded that the professor ". . . may well have believed that his information was too insubstantial to justify a public accusation". Opinion, 626 F. 2d 469, 477.

The appellees had drawn comfort from this Court's disdain for "statements shown to have been made either with knowledge of their falsity *or with reckless disregard for their truth or falsity.*" *Pickering v. Board of Education,* 391 U.S. 563, 573 (1968). (Emphasis added). Reckless disregard for the truth has been equated by this Court to serious doubt as to the truth of the publication on the part of the person making the statement or so inherently improbable that only a reckless man would have put the words in circulation (*St. Amant v. Thompson,* 390 U.S. 727, 731-732, 20 L. Ed. 2d 262 (1968)) or subjective awareness of probable falsity (*Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 335, n. 6, 416 L. Ed. 2d 789 (1974)). See *Herbert v. Lando,* 441 U.S. 153, 157, 60 L. Ed. 2d 115 (1979). A casual reading of the substance of the rumor yields the conclusion that while it may be true that the professor heard such a rumor, his ". . . allegations are so *inherently improbable* that only a reckless man would have put them in circulation." *St. Amant v. Thompson, supra* at 732. (Emphasis added).

Nonetheless, the Fifth Circuit has embraced false rumor as constitutionally protected expression *so long as the speaker truthfully disclaims firsthand knowledge of the matters in his statement.* Such a result drains much of

the force from the rule of *Pickering* withholding constitutional protection from statements made "with reckless disregard of their truth or falsity". The Fifth Circuit attempts to justify its faithfulness to constitutional doctrine by limiting *Pickering* to *false* statements and adopting an unusual standard of falsity in the context of hearsay statements. See opinion below, footnote 2, 626 F. 2d 469, 473, where the Fifth Circuit concluded that a statement that "someone told me" simply is not false even if the information is inaccurate so long as the speaker has in fact acquired the information from another. Thus, the Fifth Circuit treats the speakers having truthfully admitted at the time he made the false statement that it was based on hearsay as an act of redemption which elevates the entire statement to the dignity of First Amendment protection. While, in this sense, the declarant has not made a false statement since he had indeed heard the rumor, such a statement under the circumstances in which it was given, *i.e.*, volunteered by the declarant, simply cannot be described as having been made other than in reckless disregard of the truth. Furthermore, disregard of the substance of the underlying statement in passing judgment on the truth or falsity of the overall statement quite simply offends common sense and serves no legitimate purpose. If the Fifth Circuit view were correct, the defense of truth would be available in a libel case where the person charged had merely repeated defamatory hearsay and acknowledged it as such at the time. Such is not an accurate reflection of law of defamation. The republication of defamatory information has been "firmly established" to be actionable even though the speaker ". . . is only repeating what he has heard and names his authority . . ." since ". . . a person who repeats slander heard from others endorses it." 50 *Am. Jur.* 2d, *Libel and Slander*, §170, p. 673. See also *Goldwater v. Ginzburg*, 414 F. 2d 324, 337 (2d Cir. 1969), cert. denied 396 U.S. 1049, rehearing denied

397 U.S. 928, citing *St. Amant v. Thompson, supra,* and holding that repetition of inherently improbable words does not release one of responsibility.

CONCLUSION

Reliance on the fact of acknowledgement as hearsay as the basis for First Amendment protection of false statements to speech is erroneous. Under the Fifth Circuit's decision, which departs from the law as previously stated in *Pickering, supra,* a speaker can now claim constitutional protection if someone tells him of an enormously immoral and inherently improbable act allegedly committed by an individual and he, without any effort to verify, republishes that statement with the prefatory statement, "someone told me". Such an illogical result should not be countenanced by this Court and for this reason the defendants-appellees respectfully pray that the Court issue a writ of certiorari to the United States Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 77-215-N

NICHOLAS E. D'ANDREA,
Plaintiff,

vs.

RALPH W. ADAMS, Etc.; ET AL,
Defendants.

MEMORANDUM OPINION

(Filed January 12, 1978)

This cause is submitted to the Court on Defendants' motion filed herein October 26, 1977, for new trial or, in the alternative, for judgment notwithstanding the verdicts. The Plaintiff brought suit against the President and several administrative officers of Troy State University[1] for allegedly having denied him re-employment because of his having exercised his First Amendment rights to freedom of speech by reporting to members and administrative personnel of the Alabama State Legislature certain rumors concerning the administration of Troy State University. Defendants contended that Plaintiff's job was terminated because of disinterest in and termination of the Geography Department in which the Plaintiff was employed. The jury made separate findings of liability and

1. President Adams and Deans Barnett, Tway and Long.

entered separate verdicts against Defendants Barnett, Long and Tway in the amount of $1,000.00 each and against Defendant Adams in the amount of $2,000.00, and judgment was duly entered in accordance with the verdicts. Other Defendants, including the members of the Board of Trustees of Troy State University, were dismissed by agreement on motion for summary judgment filed in their behalf prior to the trial of the case.

This Court, subsequent to the entrance of judgment and on motion of Plaintiff's counsel, entered an order setting the attorney's fee for the Plaintiff's counsel pursuant to pertinent statutes. The right to that fee will depend upon the outcome of the instant proceeding.

The principal grounds set out in the motion of the Defendants may be divided into the following contentions.

I.

The Defendants insist that, in order that the Plaintiff might recover, it was necessary that the Court find that there was no substantial evidence to support the finding of the faculty committee relative to discontinuance of the geography program at Troy State University in which department the Plaintiff was employed. To support their contention, the Defendants cite *Ferguson v. Thomas,* 430 F.2d 852 (1970); *Green v. Board of Regents of Texas Tech University,* 474 F.2d 594 (5th Cir. 1973). The Plaintiff, in response, relies primarily upon the case of *Mt. Healthy School District Board of Education v. Doyle,* ..... U.S. ....., 50 L.Ed.2d 471 (1977). While this Court is familiar with the substantial-evidence rule as applied in other types of cases, such as social security review cases, this Court is of the opinion that such a rule has no application in civil rights law of the nature of this suit in question.

II.

The Defendants then insist that, if there were evidence of a constitutionally-offensive cause of termination, the Court erred in not submitting to the jury the question of whether the failure to rehire would have occurred "but for" the allegedly offensive conduct. The Defendants here insist that the "but for" rule should be applied under *Mt. Healthy,* supra. It should also be remembered that there is a presumption of official propriety. Defendants insist, alternatively, that there was no evidence to rebut the presumption that the officials of the University acted properly and that, therefore, the matter should never have been submitted to the jury under any circumstances.

III.

The Defendants then insist that the Court erred in failing to give their requested charge No. 20 to the effect that, if the Defendants acted in good faith with reasonable ground to believe that they had the right to so act, they were immune from suit for acts done within the scope of their authority. The Defendants, in making such assertion, rely upon *Rizzo, Mayor of Philadelphia v. Goode,* 423 U.S. 362 (1976), and *Scheuer v. Rhodes,* 416 U.S. 232 (1974). The Plaintiff responds that the jury was properly charged on the defense of good-faith-with-reasonable grounds and that the requested charge No. 20 of the Defendants was covered in the oral charge of the Court.

IV.

The Defendants further point out that, in regard to the cases made against the individual Defendants, there was no evidence that the Defendants Long or Tway, at the time that they voted to support the decision not to continue the geography program and thereby implicitly

voted that the Plaintiff's job be discontinued, had no knowledge whatsoever that the Plaintiff had made any statements in regard to the administration of Troy State University or had otherwise done anything which would cause them to believe that he should not be re-employed. The Court submitted to the jury the question of whether the Defendants declined to rehire Plaintiff because of a need to discontinue the geography program or because he had made a special trip to the Legislature in Montgomery to report unsubstantiated rumors about the administration of Troy State University. The jury found that Defendants declined to rehire Plaintiff because of his reports. While there was strong evidence from which the jury might have found for the University, there was sufficient evidence to support the jury's verdict as to Dr. Adams and Dean Barnett (there was some evidence that they knew of the reports). This Court is of the opinion that there was, in fact, no evidence of the knowledge by Defendants Long and Tway of the conduct of the Plaintiff and that, therefore, there was no substantial evidence to support the verdicts against them. Accordingly, judgment n.o.v. should be granted for the Defendants Long and Tway.

V.

More importantly and controllingly, in the view of this Court, the Defendants assert that the Constitution does not protect the freedom of speech of a public employee to the extent of allowing such public employee to spread unsubstantiated information detrimental to the promotion of efficiency of the public services the public servant is employed to promote. In other words, the Defendants insist that free speech of a public employee is limited by definition of his necessary loyalty as it pertains to his duty of support to the public project he was employed to support and that

the Plaintiff's conduct in reporting to the Legislature unsubstantiated rumors in regard to Troy State University constituted a total disregard for the welfare of Troy State University and of the educational programs the Plaintiff was employed to support. The Plaintiff points out, and it is without question, that the Fifth and Fourteenth Amendments protect public employees against impermissible grounds of discharge and that the exercise of the right of freedom of speech is protected by the First Amendment to the Constitution. See, *Pickering v. Board of Education,* 391 U.S. 563 (1968); *Pred v. Board of Public Instruction,* 415 F.2d 851 (5th Cir. 1969); *Hobbs v. Thompson,* 448 F.2d 456 (5th Cir. 1971). It is clear that:

> "[I]n order to justify the slightest interference with First Amendment rights, there must be a showing that the exercise of such rights 'materially and substantially' interfered with the duties required to be performed by an employee." See, dissenting opinion, *Abbott v. Thetford,* 529 F.2d 695, at 707, which was expressly adopted as the opinion of the Court En Banc in *Abbott v. Thetford,* 534 F.2d 1101 (5th Cir. 1976).

The *Abbott* case recognizes the profound national commitment to the concept that debate and expression of opinions on public issues should be uninhibited, robust and wide open and that such activity may well include vehement, caustic and unpleasant attacks upon government and public officials; however, it also recognizes that, in considering First Amendment rights, the Court is always required to look at the place, time, and circumstances involved in striking the necessary delicate balance between the interest of the government (Tenth Amendment) and the constitutional rights of the individual.

It is well recognized that, in cases testing the propriety of discharge from public employment because of the exercise of a constitutional right, the importance of that right must be weighed against the right of a government to regulate the individual where compelling government interest is shown to outweigh the individual interest. *Abbott v. Thetford,* 354 F.Supp. 1280 (M.D. Ala. 1973); *United States v. Pipe Fitters Union,* 434 F.2d 1116 (1970), adhered to 434 F.2d 1127, reversed on other grounds 407 U.S. 385 (1972); *American Federation of Teachers v. School District,* 314 F.Supp. 1069 (D. Colo. 1970); *Morales v. Turman,* 326 F.Supp. 677 (D.Tex. 1971); *Wallace v. Brewer,* 315 F.Supp. 431 (D.Ala. 1970). The Defendants insist that they have shown a compelling State interest that employees of Troy State University (an organization dependent largely upon the State Legislature for financial support) not undercut programs seeking allocation of funds from the State Legislature.

As stated in *Abbott,* supra, "It is only claimed that in 'the very narrow fact pattern of this case' the discharge is invalid." 529 F.2d at 702. This Court must, therefore, walk a narrow line in deciding whether this case falls within that line of cases allowing discharge because the State of Alabama has a controlling interest in regulating the speech of its employees that interfere substantially with the educational program the employees are hired to support.

In *Abbott v. Thetford,* supra, the Court en banc considered Mr. Abbott's right to bring a suit in favor of orphans or neglected children—a matter Mr. Abbott felt a moral obligation to pursue. However, the bringing of that suit by Abbott, who was Judge Thetford's Chief Probation Officer, affected the efficiency of the Court because the defendants in the suit included certain children's homes and certain officials who had the discretion to refuse placement of neglected children in their institutions by Judge Thet-

ford. The reports made by Mr. Abbott, as well as those made by Dr. D'Andrea, concerned matters of serious public importance which should have been investigated. The problem in each case is whether presentation of the reports was inconsistent with the public service the reporters (Abbott and D'Andrea) were employed to support. The *Abbott* Court recognized that the harmony and goodwill of the officials of all of these agencies involved were in the best interest of the Court and of the children of which the Court had jurisdiction, that the importance of a cooperative and confidential relationship between staff members is essential and that absence of such cooperation and confidentiality is disruptive and inevitably impairs the operations of the Court and that the function of courts and personnel who work closely with judges is not to engage actively in litigation but is to achieve effectively the objects and purposes for which the court was created.

Applying comparable tests to the facts in the case at bar, this Court is of the opinion and finds that the harmony and goodwill of the legislators were in the best interest of the University; that the importance of a cooperative relationship with the Legislature of Alabama is essential to the operation of the University; and that the function of the University facility is not to engage actively in legislation but is to achieve effectively the objects of education of students.

In *Smith v. United States,* 502 F.2d 512 (5th Cir. 1974), the Court found that Smith, a clinical psychologist employed at a Veterans Administration Hospital who insisted upon his First Amendment right to wear a peace pin on the lapel of his coat while working among veterans, was insisting upon a First Amendment right which directly interfered with the proper performance of his duties and that the

duties of the Veterans Administration outweighed the right of the employee to so express his desire for peace.

In *Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir. 1969), the right of free speech of a Lackland Air Force Base instructor was found to yield to a superior government interest where he was dismissed because of making certain statements concerning the Viet Nam War and anti-Semitism to a class of foreign military officers. The Court held that Goldwasser's First Amendment right to free speech did not give him the right to express his opinions in the context of his "highly specialized teaching assignment." 417 F.2d at 1177.

In these cases, the courts applied the test and held that the exercise of First Amendment rights materially and substantially interfered with the public duties required to be performed by a public employee and that, therefore, the employee might be properly restrained or disciplined for attempting to exercise such rights. A different view was expressed in *Pickering v. Board of Education*, supra, and *Pred v. Board of Public Instruction*, supra, where the expression by the teachers did not materially and substantially interfere with the duties of their employment.

While Dr. D'Andrea was primarily employed as a school teacher and, to a lesser extent, as an administrator, he was employed to effect the program of Troy State University and the primary purpose of his employment was to present an effective educational program at the University. The effectiveness of the program would be directly dependent upon the ability of the University officials to obtain proper financing through the Alabama Legislature. Any attempt to discredit the program of the University in the eyes of the State Legislature must necessarily interfere with the program itself and would, in the opinion of this Court, "materially and substantially interfere with the

duties required to be performed by" Dr. D'Andrea. The fact that much of the information distributed by Dr. D'Andrea was obtained from less than reliable sources and was not substantiated aggravates the Plaintiff's violation of his obligations to the program of the University.

It is, therefore, the opinion of this Court that the verdicts and judgment of this Court in this cause are contrary to the law and that judgment for the Defendants should be entered notwithstanding the verdicts.

DONE this 12th day of January, 1978.

/s/ R. E. Varner
United States District Judge

APPENDIX B

Nicholas E. D'ANDREA,
Plaintiff-Appellant,

v.

Ralph W. ADAMS, President of Troy
State University, et al.,
Defendants-Appellees.

No. 78-1499.

United States Court of Appeals,
Fifth Circuit.

Sept. 26, 1980.

Tenured assistant professor of geography filed suit against four university administrators, alleging that the decision to terminate the geography program at the university was in fact a retaliation against plaintiff for his statements to state officials concerning university finances, and as such violated his First Amendment rights. The United States District Court for the Middle District of Alabama, at Montgomery, Robert E. Varner, J., granted a defense motion for judgment n. o. v., and plaintiff appealed. The Court of Appeals, Randall, Circuit Judge, held, inter alia, that circumstances in which statements concerning university finances were made by plaintiff to a legislative budget subcommittee engaged in reviewing funding of state agencies, including the university, did not remove the statements from the protection of the First Amendment; the allegations did not concern matters to which plaintiff might be presumed to have greater access to the real facts than would his intended audience, and he was careful to identify his information as hearsay when it was, in fact, sec-

ond-hand information; furthermore, the fact that he identified the sources of information clearly suggested that he expected the legislature to investigate and verify the allegations before acting upon them.

Reversed and remanded, with directions.

1. Constitutional Law (Key) 46(1)

Suit brought by tenured assistant professor of geography, who alleged that the university's decision to terminate the geography program was in fact a retaliation against him for his statements to state officials concerning university finances, and as such violated his First Amendment rights, was not mooted by reason of his reemployment by the University, since he had been dismissed for a time and since he sought injunctive relief against future violations of his constitutional rights. U.S.C.A.Const. Amend. 1.

2. Civil Rights (Key) 13.13(3)

In suit brought by a tenured assistant professor of geography who alleged that the decision of defendant university administrators to terminate the geography program was in fact a retaliation against him for his statements to state officials concerning university finances, and as such violated his First Amendment rights, there was sufficient evidence for a reasonable jury to conclude that all the administrators, including the dean of the college of arts and sciences and the chairman of the department of history and social science, knew about the statements made by plaintiff to state officials, and there was thus sufficient evidence in support of the jury's conclusion that all the administrators participated in the discharge of plaintiff in retaliation for his statements.

3. Civil Rights (Key) 13.13(1)

Dismissed university professor had the burden of proving that he was dismissed for exercising his constitutional rights.

4. Constitutional Law (Key) 90.1(5)

A knowing or reckless falsehood is not protected by the Constitution. U.S.C.A. Const. Amend. 1.

5. Libel and Slander (Key) 30

A statement that "someone told me" or "I have heard" certain information simply is not false, even if the information is inaccurate, unless the speaker has not in fact acquired the information from another. U.S.C.A.Const. Amend. 1.

6. Civil Rights (Key) 13.13(1)

After plaintiff established to the jury's satisfaction that he was dismissed as a tenured assistant professor because of his exercise of constitutional rights, the state at that point assumed the burden of justifying its action by showing that plaintiff's activities, involving statements made to state officials concerning university finances, materially and substantially interfered with the requirements of appropriate discipline in the operation of the university. U.S.C.A. Const. Amend. 1.

7. Colleges and Universities (Key) 8.1(3)

Even when a school is seeking revenue that the administration considers necessary to school operations, a school employee is free to speak openly on the question, though he disagrees with the administration.

8. Colleges and Universities (Key) 8.1(3)

Constitutional Law (Key) 90.1(1)

Circumstances in which statements concerning university finances were made by plaintiff, a tenured assistant professor, to a legislative budget subcommittee engaged in reviewing funding of state agencies, including the university, did not remove the statements from the protection of the First Amendment; the allegations did not concern matters to which plaintiff might be presumed to have greater access to the real facts than would his intended audience, and he was careful to identify his information as hearsay when it was, in fact, second-hand information; furthermore, the fact that he identified the sources of information clearly suggested that he expected the legislature to investigate and verify the allegations before acting upon them. U.S.C.A.Const. Amend. 1.

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Coale, Helmsing, Lyons & Sims, Champ Lyons, Jr., Mobile, Ala., Capell, Howard Knabe & Cobbs, Thomas S. Lewson, Jr., Montgomery, Ala., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Alabama.

Before MORGAN, ANDERSON and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

This appeal concerns a controversy between Dr. Nicholas D'Andrea, a tenured assistant professor of geography at Troy State University (TSU) in Alabama, and four administrators (collectively referred to as the Administra-

tors) of that school: Dr. Adams, President of TSU; Dr. Barnett, Chief Academic Dean; Dr. Long, Dean of the College of Arts and Sciences; and Dr. Tway, Chairman of the Department of History and Social Science. The issue on this appeal is whether the Administrators were within their rights in discharging Dr. D'Andrea for communicating information he possessed that suggested impropriety in the use of TSU funds to a legislative budget subcommittee that was engaged in reviewing funding of state agencies, including TSU. Dr. D'Andrea contends that his statements were protected by the first amendment. The Administrators contend that Dr. D'Andrea's statements were not constitutionally protected because they materially and substantially interfered with the performance of his duties and with the functioning of school programs, and because the statements were made with reckless disregard for their truth. Additionally, the Administrators contend that there was insufficient proof for the jury to conclude that defendants Tway and Long knew of Dr. D'Andrea's statements to the state legislature, and hence to conclude that they participated in his discharge in retaliation for those statements. Under proper instructions, the jury returned a verdict in Dr. D'Andrea's favor against all the Administrators. The trial court granted the Administrators' motion for judgment, n. o. v., on the ground that Dr. D'Andrea's statements were not constitutionally protected and also on the ground that there was insufficient evidence to support a verdict against defendants Tway and Long. We reverse.

In November 1976, Dr. D'Andrea went to the Alabama Capital in Montgomery and spoke to a Mr. Kirkland, then an administrative assistant to the Lieutenant Governor, and to an examiner from the Alabama Department of Examiners of Public Accounts, who was engaged in an examination of TSU finances in preparation for budget subcommittee hearings in the state legislature regarding

the funding of the school. At that time, Dr. D'Andrea conveyed to Mr. Kirkland and the examiner information he had received from other people, whom he identified, concerning assertedly improper uses of TSU funds. Whether the information was true, partially true, or wholly false cannot be determined from the record because the trial court pretermitted inquiry into that question. For purposes of this appeal, we assume the information was inaccurate. Apparently, TSU received a "clean bill of health" after the legislative examination of the school's finances and it received the appropriation it had sought. Dr. Adams in particular was commended for his management of the school.

In January 1977, Dr. D'Andrea was told that the geography program at the school was going to be discontinued, and that his services as a professor of geography would no longer be needed. The decision to eliminate the geography program was made at a meeting on January 13, 1977, attended only by the Administrators. Dr. D'Andrea exercised his right as a tenured faculty member under TSU's procedures to seek other employment at the school for which he was qualified. The Ad Hoc Committee on Credentials did not recommend placement in another position, and Dr. D'Andrea sought review of this decision by the Faculty Personnel Advisory Committee. Dr. D'Andrea received notice of the hearing, which indicated that, because of the Ad Hoc Committee's recommendation, termination of the geography program "would carry with it a termination of your tenured status at the University." The notice informed Dr. D'Andrea that the hearing would cover the decision to terminate the geography program and the recommendation that Dr. D'Andrea not be offered an alternative teaching position. After a hearing, at which Dr. D'Andrea was present and represented by an attorney, the Faculty Committee upheld the recommendation of the Ad Hoc Com-

mittee and the decision to terminate the geography program. Dr. D'Andrea was therefore out of a job.

[1] Before the beginning of the fall semester, however, TSU determined that the decision to terminate the geography program had been precipitate, because geography instruction is a necessary component of the degree in elementary education offered by the school and because enrollment data for the fall semester apparently indicated a burgeoning interest in geography. The school therefore reinstated geography as a minor area of study and offered D'Andrea reemployment, which he accepted. In the meantime, however, Dr. D'Andrea had filed this action, alleging that the decision to terminate the geography program was in fact a retaliation against him for his statements to state officials concerning TSU finances, and as such violated his first amendment rights. The case was not mooted by reason of his reemployment, because he had been dismissed for a time and because he sought injunctive relief against future violations of his constitutional rights.

The jury was properly instructed that they could find for Dr. D'Andrea only (1) if he convinced them, by a preponderance of the evidence, that his contact with state officials was constitutionally protected and was a substantial or motivating factor in the decision to terminate the geography program, and (2) if the Administrators failed to convince them, using the same standard, that they would have terminated the geography program even absent Dr. D'Andrea's contact with state officials. *See Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). The jury returned a verdict in favor of Dr. D'Andrea, and the judgment n. o. v. did not attack the jury's determination that the termination of the geography program was motivated by

Dr. D'Andrea's contact with state officials and that the termination would not have occurred absent that conduct.[1] Accordingly, there is no *Mt. Healthy* issue in this appeal.

The only questions we face are (1) whether there was sufficient evidence for a reasonable jury to conclude that on January 13 Tway and Long knew about Dr. D'Andrea's contact with state officials, and (2) whether, as a matter of law, Dr. D'Andrea's statements to those officials were protected by the first amendment.

In passing on the first question, we are guided by the standard of review for judgments n. o. v. enunciated in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). Considering all the evidence "in the light and with all reasonable inferences most favorable to" Dr. D'Andrea, our task is to decide whether Dr. D'Andrea presented "evidence of such quality and weight that reasonable and fairminded [jurors] in the exercise of impartial judgment might reach different conclusions" with regard to the question whether Tway and Long knew about Dr. D'Andrea's statements when they attended the January 13 meeting at which all the Administrators agreed to terminate the geography program. "[I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Id.*

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1. With regard to Tway and Long, the trial court held that there was not sufficient evidence for a reasonable jury to conclude that those defendants knew of Dr. D'Andrea's contact with state officials. Since they could not be motivated by what they did not know, if the trial court was correct Dr. D'Andrea did not establish the prima facie case required by *Mt. Healthy*. Because we hold that there was sufficient evidence for a reasonable jury to conclude that Tway and Long knew of Dr. D'Andrea's statements to state officials, and because the verdicts against those defendants indicate that the jury, properly instructed, did so conclude, all the Administrators stand in the same position with regard to the satisfaction of *Mt. Healthy's* prima facie case requirements.

Under the *Boeing* standard, there was sufficient evidence for a reasonable jury to conclude that all the Administrators discussed Dr. D'Andrea's statements to state officials when they met on January 13. Only the Administrators were present at the meeting. The jury's necessary finding that Dr. Adams and Dr. Barnett knew of the statements at that time is not challenged on this appeal. Dr. Tway was the last to arrive at that meeting. He testified as follows regarding his arrival at the meeting and the ensuing discussion:

> DR. TWAY: When I first went into the office Dr. Barnett and Dr. Long were sitting off to my right. I pulled my chair up to the front right-hand corner of the president's desk and he was rather off center behind his desk. . . I pulled my chair up to his desk and he said to me, "What are we going to do—what about D'Andrea?" . . . And I said, "Well, what about Dr. D'Andrea?" And he said —I don't attempt to quote verbatim, it is a long time back, but something in the sense, "Well, he is just not as loyal as a fellow ought to be." And I made no response to that. I had no reason to be in defense or complimentary of his loyalty. The conversation immediately turned to discussion which led me to respond to the president it's my impression that if a man has tenure he could only be dismissed from his position as such for moral turpitude, incompetency to perform the job, or being guilty of some criminal offense. I said I don't know of either moral turpitude or criminal offense of Dr. D'Andrea. I went on to say we would have difficulty convincing anyone that the man was incompetent since he had been runner-up once and perhaps more than once for the outstanding teacher award known as Ingles Award:

> No sooner had I made that comment than the four of us went into a discussion of the viability of the geography program, for which I presume I was called in there.

The jury thus had before it direct evidence that Dr. D'Andrea's loyalty to TSU was questioned in the presence of all the Administrators at the January 13 meeting. No witness offered any explanation of what Dr. Adams may have meant. Dr. Adams denied that he characterized Dr. Andrea as disloyal.

In addition to Dr. Tway's testimony, the jury had before it evidence tending to show that although the problem of low enrollment in the geography program—the reason asserted by defendants for the termination of the program—had been informally discussed by members of the school administration for several months before the January 13 meeting, that meeting was not planned in advance. Rather, everyone involved concedes that the meeting, lasting only about an hour, was convened on the spur of the moment. Although the problem of low enrollment was assertedly the sole reason for terminating the geography program, no enrollment statistics were available at the meeting. No faculty committees were consulted concerning that decision, although the evidence showed that there were several such committees whose responsibilities included advising on curricular changes.

[2] Taking all the evidence into consideration, a reasonable jury could conclude that, despite the Administrators' denials, Dr. D'Andrea's statements to state officials were discussed by all the Administrators at the January 13 meeting. No issue was taken with the jury's conclusion that Drs. Adams and Barnett knew of the statements. The jury could reasonably have believed Dr. Tway's testimony that Dr. Adams raised the question of Dr. D'Andrea's

loyalty, and disbelieved his testimony that—although he knew of nothing reflecting poorly on Dr. D'Andrea's character—he simply did not challenge or inquire about the president's assertion that Dr. D'Andrea, a professor in Dr. Tway's department, was disloyal. Finally, a jury could reasonably conclude that a major curricular revision would not normally have been instituted in such a hasty and indeliberate fashion, and that the decision to terminate the geography program was, under those circumstances, deliberately done with the acquiescence of all the Administrators for the purpose of penalizing Dr. D'Andrea for his statements to state officials. We therefore hold that the district court erred in concluding that there was insufficient evidence that at the January 13 meeting defendants Tway and Long knew about the statements made by Dr. D'Andrea to state officials.

[3-6] We turn now to the fundamental issue on this appeal, which is whether Dr. D'Andrea's statements to state officials were protected by the first amendment. Dr. D'Andrea had the burden of proving that he was dismissed for exercising constitutional rights.[2] *Fluker v. Ala-*

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2. The Administrators also contend that Dr. D'Andrea's statements were not protected by the first amendment because they were false and made with reckless disregard for the truth. The "knowing of reckless falsehood" is not protected by the Constitution, *Garrison v. Louisiana*, 379 U.S. 64, 73, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964). As we have noted the trial court pretermitted inquiry into the accuracy of the information conveyed in Dr. D'Andrea's statements, and for purposes of the appeal we assume that the underlying information conveyed by the statements was inaccurate. The jury, however, was instructed that "a false statement made with reckless disregard of the truth, however, does not enjoy Constitutional protection and cannot be made the basis of a verdict for the plaintiff in this action if standing alone," and returned a verdict for Dr. D'Andrea, from which we infer that they found that the statements were not made with reckless disregard for the truth. The judgment n. o. v. did not attack this necessary jury determination. In any event, even if the *underlying information* conveyed in Dr. D'Andrea's

(Continued on following page)

bama State Bd. of Educ., 441 F.2d 201, 206 (5th Cir. 1971). This he did to the jury's satisfaction. "At that point, the State assumed[d] the burden of justifying its action by showing that the complainant's activities 'materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school.'" *Id.* (internal quotation from *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966), quoted in *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 509, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969)).

The trial court's basis for entering judgment n. o. v., in favor of all the Administrators, was that Dr. D'Andrea's statements necessarily interfered with his duties at TSU. The court said:

> While Dr. D'Andrea was primarily employed as a school teacher and, to a lesser extent, as an adminstrator, he was employed to effect the program of Troy State University and the primary purpose of his employment was to present an effective educational program at the University. The effectiveness of the program would be directly dependent upon the ability of the University officials to obtain proper financing through the Alabama Legislature. Any attempt to discredit the program of the University in the eyes of the State Legislature must necessarily interfere with the program itself and would, in the opinion of this Court, "materially and substantially interfere with the duties required to be performed by" Dr. D'Andrea. The fact

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Footnote continued—

statements was inaccurate, his statements cannot, on this record, be characterized as false. The evidence clearly shows that Dr. D'Andrea identified his information as hearsay or second-hand. A statement that "someone told me" or "I have heard" certain information simply is not false—even if the information is inaccurate—unless the speaker has not in fact acquired the information from another.

that much of the information distributed by Dr. D'Andrea was obtained from less than reliable sources and was not substantiated aggravates the Plaintiff's violation of his obligations to the program of the University.

In *Pickering v. Board of Education,* 391 U.S. 563, 568-73, 88 S.Ct. 1731, 1734-37, 20 L.Ed.2d 811 (1968), the Supreme Court attempted to adumbrate "some of the general lines along which an analysis of the controlling interests" implicated in a dismissal-from-public-employment-for-speech case should run. One consideration the Court thought relevant was whether the employee's statements were critical of a person "with whom appellant would normally be in contact in the course of his daily work as a teacher," such that the criticism might impede "either discipline by immediate superiors or harmony among coworkers." *Id.* at 569-70, 88 S.Ct. at 1735. The evidence shows that Dr. D'Andrea's statements implicated only "higher administrative officials" at TSU, and there is no evidence that Dr. D'Andrea named any specific school official. Therefore, the evidence does not support the proposition that the statements for which Dr. D'Andrea was dismissed were, directly or implicitly, critical of people "with whom appellant would normally be in contact in the course of his daily work."

Nor does the evidence show that Dr. D'Andrea's duties at TSU placed him in a position "in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that [his statements] would seriously undermine the effectiveness of the working relationship between them . . . ." *Id.* at 570 n. 3, 88 S.Ct. at 1735 n. 3.

The *Pickering* Court next considered the impact of false statements by a teacher on school operations. The Court

differentiated between the impact of critical statements on the working relationship of the speaker and his superiors or coworkers and the impact of critical, and inaccurate, statements on school operations. As we have just said, the former impact is not relevant here because there is no evidence to show that the relationship between Dr. D'Andrea and "higher administrative officials" was a "close working relationship for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper function." *Id.* at 570, 88 S.Ct. at 1735.

With regard to the impact on school operations, the Court first noted that the school board had not shown that Pickering's statements, in the form of a letter to the editor of a local paper, had any actual detrimental impact upon school operations. The same is true of this case. The *Pickering* Court noted, however, that since Pickering's statements, which criticized the school board for expending too much money on athletics, were made *after* the proposal for a tax increase for school finances was defeated at the polls, those statements could "have had no effect on the ability of the school district to raise necessary revenue." *Id.* at 571, 88 S.Ct. at 1736. Since D'Andrea's statements were made at a time when TSU was seeking an appropriation from the state legislature, his statements *could* have had an effect on TSU's ability to raise necessary revenue, although the evidence suggests that they did not. The Court went on to emphasize, however, that the question whether a school needs additional funds is a matter of legitimate public concern "on which the judgment of the school administration . . . cannot . . . be taken as conclusive." *Id.* To accept the Administrators' position that the interference that justifies dismissal of a public employee exists whenever a professor makes statements that present "a substantial risk of weakening and undermining the state legislature's support for the University" would be to impose on teachers in public employment a general duty of

loyalty to the specific goals of the administration, a position specifically rejected by the *Pickering* Court. *Id.* at 568-69, 88 S.Ct. at 1734-35.

[7] *Pickering* makes it clear that even when a school is seeking revenue the administration considers necessary to school operations, a school employee is free to speak openly on the question even when he disagrees with the administration. This case, however, includes some circumstances not present in *Pickering.* The most important of these is that Pickering's statements were made in a public forum, while Dr. D'Andrea's statements were made privately. Both teachers' statements were addressed to the forum that held their respective schools' purse strings: Pickering's to the general public, since they voted on proposed tax increases for school finances; Dr. D'Andrea's to a state official connected with the state legislative budget subcommittee, which makes recommendations concerning appropriations for state agencies.

Although the Administrators concede that *Pickering* permits free and open public criticism of school policy by school employees, and that *Givhan v. Western Line Cons. Sch. Dist.,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), protects criticism of a superior addressed privately to the superior by a public employee, the Administrators suggest that the opportunity to respond to and rebut such criticism is absent here, and that such an opportunity is a fundamental factor to be considered in determining whether the *Pickering* balance of competing state and individual interests tips in favor of first amendment protection for critical statements made by public employees. The basic inquiry in *Pickering* was whether "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is . . . significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573, 88 S.Ct. at 1737. Although the Court suggested that the opportunity to rebut or

clarify inaccurate factual statements by a teacher was a factor to be considered in the *Pickering* balance, it did not say that such a consideration was determinative. Moreover, the Court seemed more concerned with the possibility that in some circumstances a teacher's statements might, *because of their subject matter,* be given undue credit, than with the question whether the teacher addressed himself to the general public rather than to some smaller audience. The Court noted that the matters Pickering discussed were not "so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts." *Id.* at 572, 88 S.Ct. at 1736.

[8] The circumstances in which Dr. D'Andrea's statements were made do not remove the statements from the protection of the first amendment. The allegations did not concern matters as to which Dr. D'Andrea might be presumed to have greater access to the real facts than would his intended audience. To be certain, as a member of the TSU community he might well have greater access to the real facts than would be the general public; but he was careful to identify his information as hearsay when it was, in fact, second-hand information; and it must be remembered that he was delivering the information to a legislative subcommittee, not to the general public. That he identified the sources of his information clearly suggests that he expected the legislature to investigate and verify the allegations before acting upon them; and, of course, a state legislature has investigative powers not possessed by members of the general public. Moreover, the Administrators' allegation that the circumstances in which Dr. D'Andrea's statements were made left them no opportunity to rebut the charges must be considered in the light of what actually happened. The record in this case

suggests that, like Pickering's letter, Dr. D'Andrea's statements were met "with massive apathy and total disbelief." It is only reasonable to assume that had the officials to whom Dr. D'Andrea spoke credited the information he conveyed, they would have asked TSU officials to comment on, explain, or deny the rumors.

What was said in *Swaaley v. United States*, 376 F.2d 857 (Ct.Cl.1967), is apposite here. In that case Swaaley was dismissed from his job at the New York Naval Shipyard after he sent a letter to the Secretary of the Navy, and no one else, charging that graft and corruption infected promotional decisions. The court observed:

> An employee writing a letter such as we have here might be presumed to desire that the Department would cause his charges to be investigated. He would almost never be able to prove anything himself; that is hard enough for trained investigators using sophisticated techniques, and yet solely by rumor and hearsay he may have a pretty good idea where the bodies are buried. Hence, to say an employee reporting what he believes is going on is guilty of misconduct if he cannot prove it, is tantamount to saying he is not to transmit anything at all. Any regulation which would compel the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of dismissal from his job—leads to "self-censorship," a result which cannot be tolerated in this area.

376 F.2d at 861-62. [citations omitted].

Dr. D'Andrea may well have believed that his information was too insubstantial to justify a public accusation, yet substantial enough to warrant investigation by the budget subcommittee. Moreover, he may have been

apprehensive that disclosure of the information and of his visit to Montgomery to administrative officials at TSU would result in his dismissal or other objectionable consequences. He was entitled to assume that his statements would be dealt with prudently; that the rumors he had heard would be investigated; and that if they appeared to have a factual foundation, the TSU officials involved would have an opportunity to respond to them.

As Judge Goldberg observed in *Porter v. Califano,* 592 F.2d 770, 779 (5th Cir. 1979), "*Pickering* states that the First Amendment requires the government not just to show that certain employee speech injures the government, but to show that the benefits of preventing the injury actually outweigh the profound benefits of free speech in this society." The Administrators have utterly failed to make such a showing. Accordingly, we hold that the entry of judgment n. o. v. by the district court was error.

After the favorable verdict and before entry of the judgment n. o. v., the trial court awarded Dr. D'Andrea attorney fees and expenses totalling $7,832.70 for the trial of the case, pursuant to 42 U.S.C. § 1988. That award is to be reinstated along with Dr. D'Andrea's favorable jury verdict. In addition, Dr. D'Andrea is entitled to an award of costs, including as an item of costs an attorney fee, for the prosecution of this appeal. While we have authority to determine the attorney fee to which he is entitled, *Knighton v. Watkins,* 616 F.2d 795 (5th Cir. 1980), we consider it better, under the circumstances, to remand the case to the district court for a determination of the proper costs to be awarded, in accordance with the standards in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974).

REVERSED and REMANDED with directions.

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

Gilbert F. Ganucheau
Clerk

Tel 504—589-6514
600 Camp Street
New Orleans, LA. 70130

OCTOBER 27, 1980

TO ALL PARTIES LISTED BELOW:

NO. 78-1499 - Nicholas E. D'Andrea -vs- Ralph W. Adams, etc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Gilbert F. Ganucheau, Clerk
By /s/ Claudia R. Nides
Deputy Clerk

cc: Mr. Jerry D. Anker
Mr. Thomas S. Lawson, Jr